



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 5, 1992

Ms. Mary Kay Fischer
Assistant City Attorney
City of Galveston
P. O. Box 779
Galveston, Texas 77553-0779

OR92-578

Dear Ms. Fischer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14543.

You have received a request for access to numerous documents, including correspondence, contracts, billing records, and personnel files. You advise us that some of the requested information does not exist. The Open Records Act does not require a governmental body to obtain information that does not exist. Open Records Decision No. 572 (1990). You also advise us that some of the requested information has already been released to the requestor. You seek to withhold the remainder under sections 3(a)(1), 3(a)(2), 3(a)(8), 3(a)(11), 3(a)(15), and 3(a)(17) of the Open Records Act.

You seek to withhold medical and psychological information relating to city employees. Section 5.08(b) of the Medical Practices Act, article 4495b, V.T.C.S., prohibits the release to the public of "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician." The protection for medical records under section 5.08(b) continues after the death of the patient. See Attorney General Opinion JM-229 (1984). Certain mental health records must be withheld under article 611.002 of the Health and Safety Code. See also Open Records Decision No. 455 (1987).

The doctrine of common-law privacy protects information containing highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, provided the information is not of legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540

S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of constitutional privacy involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *Id.* Previous open records decisions issued by this office have held certain medical information to be excepted from required public disclosure under the doctrines of common-law or constitutional privacy, including detailed information about a person's use of medications, emotional or mental distress, and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illness, and convulsions/seizures. *See* Open Records Decision Nos. 455 (1987); 396; 370 (1983); 343 (1982). Not all medical information, however, is excepted from required public disclosure; individual determinations are required. *Industrial Foundation*; Open Records Decision No. 370 (1983). General medical information about a public employee that contains no embarrassing details is not protected from disclosure by common law or constitutional privacy. *See* Open Records Decision No. 455. Additionally, a public employee's marital status is not private information. *See Id.* We have marked the records submitted to us to indicate which information we believe should be withheld because of privacy interests.

You ask whether information about a deceased employee is subject to public disclosure under the Open Records Act. A deceased person has no common-law or constitutional right of privacy. *See* Open Records Decision No. 432 (1985) at 5-6. As mentioned above, records created or maintained by a physician within article 4495b, section 5.08, V.T.C.S., may be withheld pursuant to that statute, even if the records relate to a deceased person. Open Records Decision No. 598 (1991).

You also seek to withhold certain financial information relating to city employees. Information relating to an employee's membership in a deferred compensation program may be withheld to the extent that it reveals a financial decision on the part of the employee. Open Records Decision No. 545 (1990). Federal tax forms are made confidential by federal statute and therefore must not be disclosed to the public. 26 U.S.C. § 6103(a). The release of consumer credit reports is also governed by federal statute. 15 U.S.C. § 1681b; *see also* Open Records Decision No. 373 (1983).

Other information excepted from required public disclosure by statute includes N.C.I.C.I.I.I. printouts and polygraph examination results. N.C.I.C.I.I.I. printouts constitute criminal history information and are excepted by section 3(a)(1). 28 C.F.R. § 20.3(B); *see also Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e.*

per curiam, 536 S.W.2d 559 (Tex. 1976). Section 19A of article 4413(29cc), V.T.C.S., makes confidential "information acquired from a polygraph examination." We have marked the information which must be withheld from required public disclosure under the statutory exceptions as incorporated into the Open Records Act by section 3(a)(1).

You assert section 3(a)(8) excepts from required disclosure part of item number 10.A, copies of arrest records for certain crimes during a certain timeframe. With the exception of the front page, you may withhold the requested offense reports. Open Records Decision No. 127 (1976) (citing *Houston Chronicle Publishing Co.*); OR91-563 (1991) at 4-5.

You also claim that some of the requested information is excepted from required public disclosure by section 3(a)(11), which excepts memoranda and letters to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making or deliberative process. Open Records Decision No. 464 (1987) at 2-3. We have marked the information that may be withheld under section 3(a)(11).

You claim that birth certificates maintained in peace officer personnel files are excepted from required public disclosure by section 3(a)(15). In Open Records Decision No. 338 (1982), however, this office held that section 3(a)(15) only excepts birth and death certificates maintained by the Bureau of Vital Statistics and that such certificates in the possession of a city health department are public. Accordingly, the birth certificates maintained in the personnel files must be released.

Finally, you claim that some of the requested information is excepted from disclosure by section 3(a)(17), which excepts "the home addresses and home telephone numbers of each official and employee and each former official and employee of a governmental body except as otherwise provided by Section 3A of this Act, and of peace officers." Section 3A(a) provides that section 3(a)(17) is applicable only when an employee indicates in writing that he does not want his home address and telephone number disclosed. Section 3(a)(17) provides that peace officers need not affirmatively claim confidentiality for this information under section 3(a)(17). *See also* Open Records Decision No. 488 (1988). Thus, you must withhold the address and telephone numbers of peace officers, and you must withhold the address and telephone numbers of non-peace officers who have complied with provisions of Section 3A. *See also* Open Records Decision No. 530

(1989) (A governmental body may not solicit a response from its employees under section 3A(b) in response to a pending open records request.)

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-578.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/GCK/lmm

Ref.: ID# 14543
ID# 14696
ID# 14687
ID# 14787

cc: Mr. Jim Mabe
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